[Cite as *State v. Carlisle,* 2010-Ohio-1090.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 09 JE 28
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
RYAN CARLISLE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 08CR149.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Thomas Strauss Prosecuting Attorney Attorney Frank Bruzzese Assistant Prosecuting Attorney 16001 State Route Seven Steubenville, Ohio 43952
For Defendant-Appellant:	Attorney Francesca Carinci Suite 904-9110, Sinclair Building Steubenville, Ohio 43952

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 22, 2010

VUKOVICH, P.J.

¶{1} Defendant-appellant Ryan Carlisle appeals the sentence ordered by the Jefferson County Common Pleas Court after he pled guilty to two counts of felonious assault and two counts of child endangering. Carlisle contends that the sentence was excessive, disproportionate to the crimes, and that the trial court abused its discretion when it found that he did not express any remorse. These arguments lack merit; the consecutive sentences were not contrary to law and the trial court did not abuse its discretion in ordering the consecutive sentences. For the reasons expressed below, the judgment of the trial court is affirmed.

STATEMENT OF CASE

¶{2} On October 1, 2008, a four count indictment was issued against Carlisle; a bill of particulars was subsequently requested and filed. The first count charged Carlisle with felonious assault, a violation of R.C. 2903.11(A)(1), a second-degree felony. It alleged that on August 27, 2008 or August 28, 2008, Carlisle punched J.H., a seven to eight month old infant, in the face causing "lacerations and bruising of the mouth, together with tearing of the frenulum[1] and soft tissues of the mouth area." 10/01/08 Indictment. The second count also charged him with felonious assault, a violation of R.C. 2903.11(A)(1), a second-degree felony. However, this count alleged that sometime between August 23, 2008 and August 29, 2008, Carlisle burned the inside of J.H.'s mouth and throat by force feeding him "hot or alkaline substances" and by "forcibly pounding a baby bottle repeatedly into" his mouth. 10/01/08 Indictment. Count three charged Carlisle with child endangering by torture or cruel abuse, a violation of R.C. 2919.22(B)(2) and (E)(3), a second-degree felony. This count alleged that from July 1, 2008 until August 29, 2008, Carlisle recklessly tortured or cruelly abused J.H. by punching and grabbing the baby hard enough to leave obvious bruises on the baby's head, face, arms, torso and back. 10/21/08 Bill of Particulars. The final count charged Carlisle with child endangering by violating a duty of care, a violation of R.C. 2919.22(A) and (E)(2)(c), a third-degree felony. This count asserted that from

[1]The frenulum is "a median fold of mucous membrane connecting the inside of each lip to the corresponding gum." http://www.answers.com/topic/frenulum.

July 1, 2008 to August 29, 2008, Carlisle created a substantial risk to the health and safety of J.H. by violating the duty of care. Specifically, until forced to do so by J.H.'s grandfather, Carlisle did not seek medical attention for the injuries he caused to the baby, and as a result of the delay in seeking medical attention, the mouth injuries caused by the punching and forceful feeding became infected. 10/21/08 Bill of Particulars.

¶{3} Originally, Carlisle pled not guilty to the charges, but then later changed the plea to guilty. After a Crim.R. 11 colloquy, the trial court accepted the guilty plea and set the matter for a mitigation and sentencing hearing. 03/24/09 Plea Tr. 22. The mitigation and sentencing hearing was held on March 31, 2009. Following the presentation of evidence, the trial court sentenced Carlisle to an aggregate sentence of 15 years. He received five years for each of the first three counts, which were ordered to be served consecutive to each other. As to the fourth count, he received four years and that sentence was ordered to be served concurrent to the sentence on count three. Carlisle filed a delayed appeal, which this court allowed. 09/24/09 J.E.

ASSIGNMENT OF ERROR

¶{4} "THE COURT ERRED IN IMPOSING FIFTEEN YEARS WHICH IS AN EXCESSIVE SENTENCE AND FOR RUNNING THE SENTENCES ON COUNTS ONE, TWO AND THREE CONSECUTIVELY."

¶{5} We have recently explained that following the Ohio Supreme Court's decision in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, we review felony sentences using both the clearly and convincingly contrary to law and abuse of discretion standards of review. *State v. Gratz,* 7th Dist. No. 08MA101, 2009-Ohio-695, ¶8; *State v. Gray,* 7th Dist. No. 07MA156, 2008-Ohio-6591, ¶17. We first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *Gratz,* 7th Dist. No. 08MA101, 2009-Ohio-695, at ¶8, citing *Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶13-14. Then, if it is not clearly and convincingly contrary to law, we must determine whether the sentencing court abused its discretion in applying the factors in R.C. 2929.11 and R.C. 2929.12. *Gratz,* 7th

Dist. No. 08MA101, 2009-Ohio-695, ¶8, citing *Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶17.

¶{6} The sentences issued were not contrary to law. The five year sentences for each of the three second-degree felonies and the four year sentence for the third-degree felony conviction was within the applicable statutory range. R.C. 2929.14(A)(2) and (3) (providing that the applicable range for a sentence for a second-degree felony is two to eight years and that the applicable range for a third-degree felony is one to five years).

¶{7} Accordingly, since the sentence is not contrary to law, we now turn our analysis to whether the trial court abused its discretion in ordering the sentences that it did. Or in other words, did the trial court appropriately consider R.C. 2929.11 and R.C. 2929.12.

¶{8} As for R.C. 2929.11, both the sentencing transcript and the judgment entry indicate that the trial court considered R.C. 2929.11, the purposes and principles of sentencing, when imposing the sentence. 03/31/09 J.E.; 03/31/09 Tr. 60.

¶{9} Despite that evidence, Carlisle argues that the sentence was disproportionate.

¶{10} R.C. 2929.11(B) states:

¶{11} "A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

¶{12} The goal of this section is to achieve "consistency" not "uniformity." *State v. Marshall*, 8th Dist. No. 89551, 2008-Ohio-1632, ¶20.

¶{13} The Eighth Appellate District has explained:

¶{14} "R.C. 2929.11(B) 'does not require the trial court to engage in an analysis on the record to determine whether defendants who have committed similar crimes have received similar punishments. Rather, the statute indicates the trial court's comments made at the hearing should reflect that the court considered that aspect of the statutory purpose in fashioning the appropriate sentence.' *State v.*

Crawford, Cuyahoga App. No. 84153, 2004-Ohio-5737, p. 13, citing *State v. Edmonson,* 86 Ohio St.3d 324, 326-327, 1999-Ohio-110; *State v. Hunt,* Cuyahoga App. No. 81305, 2003-Ohio-175." *State v. Hughley*, 8th Dist. No. 90323, 2008-Ohio-6146, ¶69.

¶{15} Furthermore, it is noted that Carlisle has failed to present this court or the trial court with any comparative examples to demonstrate that the sentence received is disproportionate. *State v. Jones*, 7th Dist. No. 06MA109, 2008-Ohio-1541, ¶85.

¶{16} Thus, for those reasons, Carlisle's disproportionate argument lacks merit.

¶{17} Next, we must determine whether the record indicates that the trial court did not abuse its discretion in weighing and considering the seriousness and recidivism factors in R.C. 2929.12.

¶{18} In considering those factors under R.C. 2929.12, the trial court stated the following:

¶{19} "[W]hen I look at the more serious factors I find that the ones that do apply to you are that the injury was worsened because of the physical and mental condition of the victim and the age being only seven or eight months.

¶{20} "I find that there was serious physical harm from the injuries that have been related here today, also from the victim's impact statement that there was psychological harm as well and the extent of that we really don't know.

¶{21} "I also find that the offense was facilitated by your relationship and that is that you were the live-in boyfriend and that you were there on a regular basis and the baby-sitter for the child.

¶{22} "And I also have to find that this is a felonious assault which does involve a household member. It was committed in the vicinity of the child because it was committed on the child and that at that point you were the considered the in loco parentis, the person in charge of the care of that child.

¶{23} "I also have to find that there were repeated occurrences and that there were occasions that you could have stopped but you didn't, for whatever reason you didn't and I don't find that any of the less serious ones would apply to you. So the more serious factors do outweigh the less serious.

¶{24} "Then when I look at the recidivism likely or less likely factors, that is factors that would indicate whether or not it is more or less likely that you would commit another, under the recidivism likely factors the ones which apply to you is that I'm not convinced that there is genuine remorse either. I think you are sorry that you're in this situation but you have minimized your – you say that you are accepting responsibility and you are – you did admit to the indictment. You did plead guilty to the indictment. You did say that you would accept whatever punishment was appropriate but you also minimize this by blaming it on – partially on drugs, partially on Sarah Hudson [mother of J.H.].

¶{25} "You are a young man. You're only 20. I think you were 19 whenever this happened but you could have walked away. You could have done that. Why you didn't I really don't know and you really haven't been able to explain that to me.

¶{26} "When I look at the recidivism not likely factors, it is true that you don't have any. You have not been found to be delinquent. You do not have any prior convictions but under the recidivism likely factors this did happen over a period of time, over a period of two to three months on repeated occasions and so I find that the recidivism likely factors outweigh the not likely factors." (03/31/09 Tr. 60-62).

¶{27} Carlisle contends that in this analysis the trial court incorrectly determined that he was not remorseful. Given Carlisle's testimony and the evidence presented at the sentencing hearing, it is difficult to conclude that the trial court abused its discretion in finding that he lacked remorse for his actions. Admittedly, Carlisle testified that he was sorry for what he did and he also testified that he wrote a letter to Sarah Hudson apologizing for his actions. (03/31/09 Tr. 37, State's Exhibit 3). However, he also testified and stated in the letter that his relationship with Hudson contributed to his actions. (03/31/09 Tr. 37, 38, 44, State's Exhibit 3). He also blamed his actions on the use of drugs. (03/31/09 Tr. 38, 39, 44). In addition to considering the testimony and exhibits, the trial court was in the best position to view Carlisle's demeanor and voice inflections to determine whether there was genuine remorse for his actions. Given the trial court's position, the testimony, and our standard of review, we cannot find that the trial court abused its discretion when it concluded that Carlisle was not genuinely remorseful.

¶{28} Next, Carlisle argues that imposition of consecutive sentences was excessive when considering the crimes committed. This argument goes to the trial court's weighing of the seriousness factors. An officer from the Steubenville Police Department testified that during the interviews with Carlisle, Carlisle admitted that on several occasions he would hit the baby in the head and use a punch called a "hammer strike." (03/31/09 Tr. 9-11). The officer also testified that at the hospital he observed injuries all over the baby's body. (3/31/09 Tr. 10). He stated:

¶{29} "A. Yeah. Let's take, first of all, the baby in general. * * * He had bruising throughout all over his head, even behind his ears, back of his neck, on his back, some on one of his – I believe it's his left arm, I'd have to see the report to remember which of the two arms that he had – he had bruising on and you could see some of these bruising – just from my experience some of these bruises were old and some were fairly fresh, that had been more acute, something more recent and that's just what we would see on the outside. It was visible on the mouth. There was some – it appeared to be some type of infection and tearing.

¶{30} "Inside the mouth – the nurse had opened up his mouth for me. Inside of the lip you would see what's called a frenulum and that was – again it appeared infected and it was later told to us that it was actually torn.

¶{31} "* * *

¶{32} "Also, yes, inside the mouth you could see the upper palate. It appeared to have some type of burn. Doctor Adams at Trinity Hospital at that point had believed it to be some type of alkaline burn, similar to hot fluid and that went back into the back of the [baby's] throat from what we could see, later to find that the injuries also went into his nasal passages as well." (03/31/09 Tr. 13-14).

¶{33} The officer also testified to abrasions on J.H.'s body and that from further examination by medical personnel, it was discovered that the burn's in J.H.'s mouth also extended to his sinuses. (03/31/09 Tr. 15-18).

¶{34} A report from Pittsburgh Children's Hospital was admitted into evidence, which discussed the injuries to the baby and concluded that he had been a victim of "severe, repetitive physical abuse." State's Exhibit 2.

¶{35} In addition to the above, Carlisle admitted to hitting and punching the baby on several occasions over a two to three month period. (03/31/09 Tr. 43).

¶{36} Considering the above, we cannot conclude that the consecutive nature of the sentences was excessive and that the trial court abused its discretion in ordering consecutive sentences. Thus, the trial court's consideration and analysis of the factors in R.C. 2929.12 was not an abuse of discretion.

¶{37} Lastly, prior to concluding, it is noted that Carlisle cites this court to *State v. Ashipa*, 1st Dist. No. C-060411, 2007-Ohio-2245, for the proposition that the record does not support the imposition of consecutive sentences. However, that case does not support Carlisle's argument. When addressing the propriety of the consecutive sentences, the appellate court found that the trial court did not commit error in imposing consecutive sentences. Id. at ¶10-12. Thus, the First Appellate District did not reverse the sentence based on the fact that it found that the consecutive sentences were not supported by the record. Rather, it reversed the sentence because the trial court did not orally notify the defendant of post-release control and the sentencing entry did not contain a notification of post-release control. Id. at ¶15-17, 22. Thus, this case does not help Carlisle's cause. This assignment of error lacks merit. The sentence issued by the trial court was not contrary to law and was not an abuse of discretion.

¶{38} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.